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In the Supreme Court of the United States

No. [redacted] 163

OCTOBER TERM, [redacted] 1970

THE CLEVELAND TRUST COMPANY and A. DEAN PERRY, Executors of the Estate of Helen Wade Greene, Deceased,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

PETITION FOR CERTIORARI BY THE CLEVELAND TRUST COMPANY AND A. DEAN PERRY, EXECUTORS, PETITIONERS.

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CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

PETITION FOR CERTIORARI BY THE CLEVELAND TRUST COMPANY AND A. DEAN PERRY, EXECUTORS, PETITIONERS.

The Cleveland Trust Company and A. Dean Perry, Executors of the Estate of Helen Wade Greene, Deceased, collectively referred to as the Taxpayer, petition the Court to issue its writ of certiorari to the United States Court of Appeals for the Sixth Circuit, to review the judgments entered in that court by Judges Peck and McCree, with Judge Celebrezze dissenting:

In Cause No. 19,175, wherein the Court of Appeals, on the appeal of the Government, reversed the judgment entered by the United States District Court for the Northern District of Ohio, Eastern Division, in favor of the Taxpayer, on Count I of the complaint. The District Court, in the Taxpayer's refund suit, held that a gift in trust, chal-

lenged by the Internal Revenue Service, was, as a matter of law, not made in contemplation of death, and directed the jury to return a verdict accordingly. The Court of Appeals reversed.

In Cause No. 19,176, on the Taxpayer's cross-appeal, wherein the Court of Appeals affirmed summary judgment entered for the Government by the District Court on Counts II, III and IV of the complaint, wherein the Taxpayer claimed:

In Count II, that the controversy was settled pursuant to Informal Conference Agreement, and that the Government's subsequent repudiation of the Agreement and its refusal to disclose to the Taxpayer the "clearly defined error," for which alone, under its published procedures, the Government reserved the right to renounce the Agreement, makes the Government's collection and retention of the Taxpayer's money unlawful.

In Count III, that the Government, in refusing to abide by its published procedures, violated the Administrative Procedure Act, and therefore wrongfully holds the Taxpayer's money.

In Count IV, that the Government may not repudiate the Informal Conference Agreement since it retains the benefits of that Agreement under which the Taxpayer (a) paid $86,089.24 to the Government, and (b) by a separate Agreement, exacted by the Government as a condition of settlement, bound the Executors along with others to a specified cost basis for future transactions concerning certain securities.

OPINIONS BELOW.

Each of the issues this case brings to eddy has been decided at least once each way in the courts below, in opinions as follows:

Judge Kalbfleisch in the District Court upheld the Taxpayer's claims on Counts II, III and IV, by overruling the Government's motion to dismiss (transformed into a motion for summary judgment by operation of Rule 12(b) of the Federal Rules of Civil Procedure, because "matters outside the pleading" were presented) in an opinion unreported but reproduced in the Appendix to this brief, printed under separate cover, at page 1.

Judge Thomas in the District Court thereafter granted the Government's renewed motion for summary judgment on Counts II, III and IV, in an opinion reported in 67-1 USTC ¶ 12,438, and also in 266 F. Supp. ε reproduced in the Appendix, page 4.

Judge Thomas then granted the Taxpayer's motion for an interlocutory appeal under 28 U.S.C. 1292 (b), on the ground Counts II, III and IV present "novel and controlling questions of law for which there is substantial ground for difference of opinion," in an unreported opinion, reproduced in the Appendix, page 21.

The United States Court of Appeals for the Sixth Circuit, by Judges O'Sullivan, Edwards and Celebrezze, denied the interlocutory appeal in an order, unreported, but reproduced in the Appendix, page 22.

Judge Battisti in the District Court, following trial to the jury, held Count I (on the question whether the gift was made in contemplation of death) for the jury. (R. 202-219), and, the jury having deadlocked 10 to 2 in favor of the Taxpayer (R. 220), denied the Taxpayer's subsequent motion for judgment n.o.v., or in the alternative for summary judgment (R. 220-229), by unreported order. (R. 230.)

Judge Connell in the District Court, on the second trial, before a jury on a fuller record on Count I, held, at the close of all the evidence, that, as a matter of law, the gift in trust was not made in contemplation of death, and directed a verdict for the Taxpayer in an opinion reported in 68-1 USTC ¶ 12,532, page 87,415, reproduced in the Appendix, page 23, on which judgment was entered for the taxpayer pursuant to the further opinion of the court, reported in 68-1 USTC ¶ 12,532, page 87,419, reproduced in the Appendix, page 31.

The United States Court of Appeals for the Sixth Circuit, by Judges Peck and McCree, with Judge Celebrezze dissenting, in No. 19,175, reversed the judgment for the Taxpayer on Count I, and in No. 19,176, on the Taxpayer's cross-appeal, affirmed the summary judgment entered for the Government on Counts II, III and IV, in an opinion reported in 421 F.2d 475, reproduced in the Appendix, page 37.

The United States Court of Appeals for the Sixth Circuit denied rehearing *en banc* by order reproduced in the Appendix, page 54.

DATE OF JUDGMENTS.

The two judgments are dated and were entered January 23, 1970. (App. p. 54.)

DATE OF REHEARING ORDER.

Rehearing *en banc* was denied by order entered February 19, 1970. (App. p. 54.)

JURISDICTION TO REVIEW.

Jurisdiction to review is granted by 28 U.S.C. 2101(c).

QUESTIONS PRESENTED.

The questions presented are:

1. Whether a gift of $1,036,625, in trust by a mother to provide income for her adult daughter to encourage and enable the daughter to continue the family tradition of supporting charitable institutions in the community (the gift being a small fraction of family resources and in a pattern of annual gifts to the daughter, an only child, commenced 16 years earlier and adhered to in every year but three), can be deemed to have been made for the dominant purpose of evading federal estate tax under 26 U.S.C. 2035.

2. Whether, if the issue is for the jury, the evidence, as the Court of Appeals held, must be limited to events "at and before making the gift," requiring exclusion of "evidence of post-gift conditions," thereby:

(a) Barring evidence of "the sudden and unexpected nature of her death" even though the Government's answer, unamended to this day, "Denies that the death was sudden and unexpected," and

(b) Barring evidence of long-planned southern travels on which the decedent expected to leave five days later and for which transportation had been booked and reservations made at many places covering journeys of two months.

3. Whether, in such case, as the Court of Appeals held, the Government by unilateral, limited, statement that the donor's health was good "for a woman of her age," and "apparently remained materially the same," can require exclusion of evidence:

(a) Showing the nature of the decedent's health and her activities, and

(b) Showing that competent medical advisers (including the Dean of the Western Reserve Medical School and the First Chief of the Division of Gerontology of the United States Public Health Service) so little suspected any heart ailment (which was the cause of death) that in periodic physical examinations they had not even had an electrocardiogram taken during the last three years of decedent's life.

4. Whether the statutory presumption of taxability vanished upon the coming in of evidence, or whether, as the Court of Appeals supposed, the presumption remains in the case to be weighed as evidence.

5. Whether the Government may repudiate the Informal Conference Agreement pursuant to which the controversy was settled, and at the same time refuse to identify the "clearly defined error" for which alone (apart from fraud, not here claimed) the Government, by its published Rules and Regulations, reserved the right to denounce the Agreement.

6. Whether the Government's refusal to identify the "clearly defined error," for which the Government claimed to have repudiated the Agreement, is a violation of the Administrative Procedure Act, which:

(a) Requires every agency, including the Internal Revenue Service, to publish its Rules and Procedures, 5 U.S.C. 1002(a),

(b) Requires every agency action to be "accompanied by a simple statement of procedural or other grounds," 5 U.S.C. 1005(d), and

(c) Makes every agency action denying rights in whole or in part "subject to judicial review," 5 U.S.C. 1009(c).

7. Whether the Government may repudiate the burdens while it retains the benefits of a settlement—no part of which it has restored to the Taxpayer,—the Government instead holding on to:

(a) $86,089.24 it received from the Taxpayer as a part of the settlement, and

(b) The benefits of the separate Agreement required by the Government "as a part of the consideration for such settlement," binding the Taxpayer and trustees of another trust to a cost basis of $3,560,697.63 for future transactions involving certain securities.

STATUTES AND REGULATIONS.

The statutes, regulations and published procedures on which this case turns are reproduced in the Appendix, printed under separate cover.

STATEMENT OF THE CASE.

This is a tax refund suit brought by the Taxpayer in the United States District Court pursuant to 28 U.S.C. 1346(a)(1), following denial of the Taxpayer's claim for refund, to recover $677,261.97 plus interest. The amount is correct, the parties agree, if the Taxpayer is entitled to recover. (R. 466, 460.)

The controversy turns on a gift in trust made by the decedent, Helen Wade Greene, descendant of a pioneer Cleveland family, on August 15, 1957, in the sum of $1,036,625,* income to be paid to the decedent's adult daughter for life, to encourage the daughter in the family tradition of support for charitable institutions in the community. (R. 351-353, 372-374, 392-393.) The gift was but a small fraction of family resources; it was not even the largest gift in a long pattern of annual gifts to the daughter during the span of 16 years, starting when the daughter turned 30, made in every year but three. (R. 609, 611.)

The donor died suddenly and unexpectedly a year and four months later, on Christmas morning, December 25, 1958. (R. 312-313, 330, 345-346, 390.)

The Government, upon examination of the federal estate tax return, asserted the gift was made in contemplation of death. Investigation followed by the Internal Revenue Service, supplemented by additional information supplied by the Taxpayer, and eventuated in an Informal Conference Agreement pursuant to procedures established as a part of Treasury Reorganization Plan No. 1 of 1952.

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* The Court of Appeals mistakenly says: "On August 15, 1957, she transferred property having a value of $1,322,580.70 * * *." (App. p. 38.) The mistake does not affect the legal problem presented. However, the gift actually was $1,036,625 (R. 611); it was 2½ years later, on December 25, 1959, that the property had increased in value to the $1,322,580.70 mentioned by the court. (R. 464.)

which became effective by Act of Congress on March 15, 1952, formalized by Reg. 601.105(c)(3), as amended May 10, 1958. 23 Federal Register 3125.

In these proceedings, the Court of Appeals correctly noted:

> "agreement was reached between the IRS and the estate. The agreement provided for certain concessions by both sides. The IRS agreed not to raise the contemplation of death issue in return for the estate's agreement to the increased valuation of some securities held by it and payment of additional estate tax and interest in the sum of $86,089.24." 421 F.2d at 480, App. pp. 44-45.

In addition, "as a part of the consideration for such settlement" (R. 28), the Taxpayer and the trustees of another trust executed a separate Agreement fixing, for the purpose of future transactions, the cost basis of certain securities as $3,560,697.63.

The Taxpayer delivered the Separate Agreement concerning the basis of other securities, and paid the $86,089.24. The Government, evidencing its acceptance of the settlement, assessed the sum paid pursuant to Reg. 301.6213-1(d) which provides that after "the assessment has been made in accordance with its terms, the waiver [which the Taxpayer signed in connection with the settlement] cannot be withdrawn."

All parties supposed the matter ended.

Three months later, on April 2, 1962, the Government informed the taxpayer it had changed its mind. (R. 62.)

The Government nevertheless kept the $86,089.24 paid by the taxpayer pursuant to the settlement, i.e., tax of $77,781.53, plus $8,307.71 interest (R. 143), and, in the final notice of deficiency, issued a year later on March 21, 1963 (which precipitated this action), *did not undo the*

Agreement concerning basis, and, in addition *retained the settlement money the Taxpayer had paid*, stating:

> "The adjustment to the value of securities in the amount of $152,099.95 comprising the balance of the adjustment for transfers during decedent's life *have previously been agreed to.*
>
> (b)(c) These adjustments were accepted as evidenced by the execution of a waiver of restrictions on assessment and collection of the tax.
>
> The deficiency of estate tax, resulting from the *adjustments agreed to*, of $77,781.53 *has been assessed.*" (R. 96.)*

The Informal Conference Agreement was reached pursuant to procedures established by Reg. 601.105(c)(3), which provides for "agreement with the taxpayer" and limits the "authority to reopen" to situations "where substantial errors are found," Reg. 601.105(i). Upon the repudiation of the Informal Conference Agreement, the taxpayer requested the Government to disclose the error. The Regional Commissioner's response was:

> "there are several things which lead me to believe that there is a clearly defined error in this case" (R. 67).

The Taxpayer pleaded:

> "*We beg of you*—: Identify these 'things.' Specify the error. We are confident that if the 'things' that trouble you are identified, they can be fully explained and shown to be without any basis whatever." (R. 164-165.)

This plea, unanswered by the District Director, by the Regional Commissioner, or by anyone else in the Internal Revenue Service, the Taxpayer carried to the summit, but, as the Court of Appeals noted, 421 F.2d at 481, App.

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* Emphasis supplied throughout.

p. 45, the "most enlightening response" the Taxpayer ever got came belatedly (and lamely) from Commissioner of Internal Revenue Mortimer M. Caplin, who rested on the "legal presumption in favor of the Government" (R. 83).

The Government thus having elected *to hold what it received in the settlement and to repudiate what it promised in return*, the Taxpayer brought this suit.

On the single issue remaining (after grant of summary judgment for the Government on Counts II, III and IV)—*i.e.*, whether the gift was made in contemplation of death—the case was tried to a jury, twice—the *first* resulting in a jury deadlock 10 to 2 for the Taxpayer (R. 220), and the *second* in a verdict and judgment directed for the Taxpayer.

REASONS FOR ALLOWANCE OF WRIT.

I. This Court should consider whether the Government is free to reject the burdens while it retains the benefits of an Agreement. This Court should say whether the "square corner" rule that applies to the citizen, applies also to the Government.

II. Decision below reveals need for attention by this Court to the contemplation-of-death issue. It is nearly a quarter century since this Court last considered the contemplation-of-death question. That was in *United States v. Wells* (1931), 283 U.S. 102, and *Allen v. Trust Company of Georgia* (1946), 326 U.S. 630.

The teaching of those cases has been jettisoned, as the decision below shows.

In those cases this Court declared the purpose of the statute to be "to prevent the evasion of the estate tax"

and deemed the tax to apply only where the "*dominant purpose*" and "*the impelling cause*" of the gift is shown to be the purpose to escape the tax. 283 U.S. at 116-117, and 326 U.S. at 635.

In the present case, the majority in the court below disregarded the "dominant," and the "impelling" tests—and thereby has brought turmoil to the law, with cascading effects that reach beyond contemplation of death cases. Observe that:

1. The court thought that because the money for the gift "came from" a revocable trust established many years before, 421 F.2d at 479, App. p. 41, this revealed a testamentary plan. Actually, if the earlier trust had not been disturbed, half of it (after certain deductions), would have gone to the daughter, but only *after* the mother's death. The fact that the money came from that trust thus shows not, as the court supposed, a testamentary plan, but *an undoing* of the testamentary plan in order to encourage the daughter's interest in charitable works during the mother's life-time.
2. The court thought that the three instruments signed at the same time "showed the similarity of the dispositive provisions," 421 F.2d at 479, App. p. 41. Actually, these show dissimilarity, *not*, as the court supposed, similarity. The challenged instrument gave the daughter *income immediately*, during the mother's life, whereas otherwise the daughter (a) would not have received anything until after her mother's death, and then (b) would have received only half as much.
3. The court thought that because the daughter "did not need" the money, 421 F.2d at 479, App.

p. 41, the gift revealed a testamentary plan. Actually, the fact that the daughter "did not need" the money for her support, indicates, rather, that the gift was a carrying out of the very thing the mother said she wished to accomplish, *i.e.*, encourage her daughter now, presently—during the mother's life-time—in the family tradition of support for charitable institutions. This is the *opposite* of a testamentary plan; it is a life plan.

4. The court thought that because the mother already had established a "charitable trust" of her own, 421 F.2d at 479, App. p. 41, this somehow made the gift testamentary. Actually, this but reveals the court's view that the mother had done enough for charity. It also underscores failure to recognize that this corroborates the proof of the mother's wish to encourage her daughter to follow the same path.

5. The court thought that because the decedent "had at least some familiarity with the tax laws" 421 F.2d at 479, App. p. 41, the gift was made in contemplation of death taxes. The court's rule will sweep *every* gift into the net—which could not have been the Congressional purpose or it would not have conditioned the statute—for it appears unlikely anyone can be found today who will not fit the court's prospectus for identifying gifts in contemplation of death.

The decision upsets an important area of tax law, with predictable consequences in a very much broader area. What the court thought made a jury issue establishes the opposite—unless it be ruled that absence of proof of prohibited motive permits an inference of the existence of that motive.

The right to trial by jury is precious. But, as a part of that right, it surely needs to be recognized, as Judge Stephenson put it in *J. C. Penney Co., Inc. v. Robison* (1934), 128 Ohio St. 626, 193 N.E. 401:

> "it is just as pernicious to submit a case to a jury and permit the jury to speculate with the rights of citizens when no question for the jury is involved, as it is to deny to a citizen his trial by jury when he has the right." 128 Ohio St. at 634, 193 N.E. at 404.

III. If the question is for the jury, serious evidentiary problems are generated by the decision below, which will have wide consequence for a great number of litigated issues in the trial courts. Thus:

1. To hold, as did the Court of Appeals, that "post gift" events may not be looked to, works havoc with the principle of law, and of common sense, that subsequent events shed light on what went before—especially when motive is the subject of inquiry.

2. To hold, as did the Court of Appeals, that the Government may by answer deny "that the death was sudden or unexpected" (R. 34), and *then bar proof on that very issue*, presents to the Government in contemplation of death cases an astonishing weapon. It also introduces problems for courts and for a wide variety of litigants whenever inquiry must be directed, as it must in many situations, to the determination of intent or motive as of a given time.

3. To hold, as did the Court of Appeals, that the Government's unilateral—and limited—statement that health was good "for a woman of her age" and "apparently remained materially the same" shuts off inquiry, is to fashion

a rule heretofore unknown. It also gives the Government, and to others involved in litigation, a weapon to be wielded by the clever.

IV. This Court ought to settle the effect of the presumption relied on by the Government. The Court of Appeals treated it as evidence to be weighed, for it adjudged error because the District Court "viewed this evidence [*i.e.*, that already summarized showing the "dominant motive" and "impelling cause" of the gift] as sufficient to overcome the statutory presumption in favor of the government," 421 F.2d at 478, App., p. 40.

There can be no "weighing" of the presumption. The presumption simply has no office to play *after* evidence comes in.

To clear up this segment of the law, this Court should, for tax cases, as well as for all litigation where presumption has a part to play, adopt the rule, now discarded in the Sixth Circuit, but, in an earlier decision, *Kentucky Trust Company v. Glenn* (6 C.A., 1954), 217 F.2d 462, thus stated:

> "While there is a presumption that the action of the Commissioner is correct, *that presumption disappears when evidence is introduced to overcome it.* As said by Judge Learned Hand in *Alpine Forwarding Co. v. Pennsylvania R. Co.*, 2 Cir., 60 F.2d 734, 736, 'If the trial is properly conducted, the presumption will not be mentioned at all—though the judgment need not of course inevitably be reversed if it is * * *.' *The presumption merely* calls upon the opposing party to produce proof to establish his case. *It is not evidence and may not be given weight as evidence.*" 217 F.2d at 465.

V. The Court should consider the effect of the Administrative Procedure Act on the Internal Revenue Service, as it has not up to now. Under command of that statute, the Internal Revenue Service must publish its procedures, 5 U.S.C. 1002(a).

This Court should hold there is no point in publishing procedures if the Government agency is to say which it will choose to follow.

This Court should also say what the Administrative Procedure Act means when it says not only that every agency action made reviewable by statute shall be subject to judicial review, but also that:

> "Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action." 5 U.S.C. 1009(c).

The Court of Appeals held repudiation of the Agreement unaffected by the Administrative Procedure Act because, said the court, mistakenly:

> "The rejection of the informal conference agreement was in fact a determination of the estate's tax liability, a matter subject to trial de novo in either the Tax Court or in the District Court." 421 F.2d at 482, App. p. 48.

The court is in error.

The "rejection of the informal conference agreement" of course was *not* a determination of the estate's tax liability; that determination was made in subsequent proceedings which eventuated in the notice of deficiency that precipitated this suit. (R. 96.)

The construction the court put on the statute can operate only to undo the requirement of the Administrative Procedure Act that:

1. "*Any* preliminary, procedural or intermediate agency action or ruling not directly reviewable shall be subject to review upon review of the final agency action," 5 U.S.C. 1009(c), and that

2. Every agency denial "shall be accompanied by a simple statement of procedural or other grounds." 5 U.S.C. 1005(d).

The repudiation of the Informal Conference Agreement, which most surely *is* agency action, which the statute says "shall be accompanied by a simple statement of procedural or other grounds" and "shall be subject to review upon the review of the final agency action," the court below says may go unexplained and unexamined.

This frightening reasoning is reminiscent of the Report of the Committee on Ministers' Powers presented by the Lord High Chancellor to Parliament, cited in 11 *Roehner on Federal Taxation* 146, referred to as the Donoughmore Report, Cmd. 4060, reprinted in 1954, which recounts (p. 11):

> "The Acts relating to the customs and excise gave judicial powers to the Commissioners of Customs and Excise. Blackstone, though he admitted the necessity for these powers; said that in consequence 'the power of these officers of the Crown over the property of the people is increased to a very formidable height;' the opinion held to the Commissioners of Excise by the general public is reflected in Johnson's definition of the term 'Excise;' and their arbitrary powers were complained of in the House of Commons."

The Donoughmore Committee quoted with approval from Lord Chief Justice Hewart's *The New Despotism*, pp. 48-49:

> "How is it to be expected that a party against whom a decision has been given in a hole-and-corner

fashion, and without any grounds being specified, should believe that he has had justice? Even the party in whose favour a dispute has been decided must, in such circumstances, be tempted to look upon the result as a mere piece of luck. Save in one or two instances, none of the Departments publishes any reports of its proceedings, or the reasons for its decisions, and as the proceedings themselves, if any, are invariably held in secret, even interested parties have no means of acquiring any knowledge of what has taken place, or what course the Department is likely to take in future cases of the same kind that may come before it. A Departmental tribunal is, however, in no way bound, as a Court of Law is, to act in conformity with previous decisions, and this fact is commonly regarded as one of the reasons for the policy of secrecy. Others may think that the Department is afraid to disclose inconsistencies and a want of principle in its decisions. However that may be, the policy is fatal to the placing of any reliance on the impartiality and good faith of the tribunal. It is a queer sort of justice that will not bear the light of publicity."

That kind of decision-and-refusal-to-say-why the Administrative Procedure Act was intended to bring to an end. Indeed, the statute, when enacted, was hailed as:

"a bill of rights for the hundreds of thousands of Americans whose affairs are controlled or regulated in one way or another by agencies of the Federal Government. It is designed to provide guaranties of due process in administrative procedure." 92 Congressional Record 2149.

CONCLUSION.

There is grist here for this Court.

The writ should issue.

Respectfully submitted,

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May 15, 1970.